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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 5461

JAMES E. CHANCE,
*Petitioner,*

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

ANTHONY P. NUGENT, SR.,
*Counsel for Petitioner,*

ANTHONY P. NUGENT, JR.,
RICHARD F. ADAMS,
1012 Baltimore,
Kansas City, Missouri 64105,
*Attorneys for Petitioner.*

Of Counsel:
WINGER, NUGENT, RAYBURN & ADAMS,
1012 Baltimore Avenue,
Kansas City, Missouri 64105.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City, Mo. 64106, HArrison 1-3030

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

James E. Chance, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Missouri entered on April 15, 1965; a timely motion for rehearing or transfer to Court *en banc* was filed but was denied on May 10, 1965.

## OPINION BELOW

The opinion of the Supreme Court of Missouri is reported in 389 S.W. 2d 774. (Appendix A1 *et seq.*)

## JURISDICTION

The judgment of the Supreme Court of Missouri was entered on April 15, 1965. Rehearing and transfer to the court *en banc* was denied on May 10, 1965. The jurisdiction of this court is invoked under 28 U.S.C., Section 1257, since the state court has denied rights granted to petitioner under the Employer's Liability Act, 45 U.S.C., section 51, *et seq.*, particularly section 53.

## QUESTION PRESENTED

The question presented for review is: Did the giving of Instruction No. 7 by the trial court herein deny to petitioner rights granted to him under the provisions of the Employers' Liability Act, 45 U.S.C., section 51, *et seq.*, particularly section 53, by an improper injection into the case of the issue of contributory negligence as a complete bar to petitioner's recovery?

## STATUTE INVOLVED

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for

the safety of employees contributed to the injury or death of such employee." 45 U.S.C., section 53; 35 Stat. 66, c. 149, sec. 3.

## STATEMENT

Petitioner was injured when he was struck by his employer's railroad car while he was working as a switchman in defendant's retarder yard. Cars are released into the retarder yard at the top of a grade called "the hump" and allowed to roll downward into the yard by force of gravity. Their speed may be controlled by retarders and they may be sent to appropriate positions within the yard by use of switches. The operators of the switches and retarders work in towers overlooking the entire yard. At the time of his injury petitioner was standing between Track 55 and Track 56. The car which struck him was standing on Track 55 when it was struck by cars rolling into the yard from "the hump."

Defendant railroad company then had a work rule applicable to its yard employees, including petitioner, which was designated "Rule N" and which read as follows:

"Employees must expect the movement of trains, engines or cars at any time, on any track, in either direction. They are warned that they must not rely upon others to notify them of approaching trains, engines or cars."

Defendant on May 7, 1963, filed its first amended answer in which for the first time it set out "Rule N" and alleged petitioner's violation of "Rule N" as a contributing or sole cause of petitioner's injury. (Tr. 8-10, Appendix pages A11-A13). On May 27, 1963, the day the trial began, petitioner filed a timely motion to strike that part of defendant's amended answer upon the ground that the in-

vocation of "Rule N" was designed to and did inject into the trial the common law defense of contributory negligence as an absolute bar to recovery in violation of the Employers' Liability Act. (Tr. 11-12, Appendix, Pages A13-A14). This motion was overruled and the trial commenced. (Tr. 12). During the trial (Tr. 318-321, Appendix, Pages A15-A18) defendant's attorney in cross-examination of petitioner specifically referred to the language of "Rule N" for the purpose of showing his violation of the rule. Counsel for defendant, over petitioner's objections, later examined its own witnesses as to the substance, wording, meaning, and application of the rule (Tr. 719-724, Tr. 757-760, and Tr. 799-802, Appendix, Pages A18-A30) *et seq.*

The court gave the following instruction to the jury over the objection of petitioner (Tr. 1094, Appendix Page A30):

INSTRUCTION No. 7

"The court instructs the jury that if you find and believe from the evidence that plaintiff was struck and injured by the movement of a car standing on Track 55 when cars standing on said Track 55 were moved by reason of another car coming off the hump and coupling into them, and if you further find that a speed of four miles per hour was a reasonable and proper speed for a car to so come off said hump and couple into said cars, and that a car so coming off said hump at a speed of four miles per hour and coupling into said cars standing on said Track 55, would have caused said cars on Track 55 to move, and if you further find and believe that plaintiff was required to know the operating rules of defendant and that one of said rules required plaintiff to expect a movement of engines or cars on any track at any time in either direction, and if you further find that plaintiff placed himself in a position where he would have been so struck and injured by the movement of said

cars on Track 55 caused by the coupling of a car coming off the hump at a speed of four miles per hour, then your verdict will be for the defendant, and this is true even though you may find and believe that said car coming off said hump was moving at a speed greater than four miles per hour."

Thereafter judgment was entered for defendant on the jury's verdict and petitioner filed and argued his timely motion for a new trial asserting therein the court's error in overruling petitioner's objection to the use of "Rule N" in its pleading, proof and in Instruction No. 7 (Tr. 1104-1106, Appendix, Pages A30-A31). The trial court overruled the motion. Petitioner appealed to the Supreme Court of Missouri and again duly raised the point that Instruction No. 7 injected into the case the issue of contributory negligence as a complete defense by its language "and this is true even though you may find and believe that said car coming off said hump was moving at a speed greater than four miles per hour." (Appellant's Brief, pp. 11 *et seq.*, and Appellant's Reply Brief, pp. 2-6. Appendix, Page A32 *et seq.*). The Supreme Court of Missouri affirmed the judgment of the trial court (Appendix, page A1).

## REASONS FOR GRANTING THE WRIT

The writ petitioned for herein should be granted for the following special and important reasons:

1. The Supreme Court of Missouri failed to follow the provisions of the Federal Employers' Liability Act, 45 U.S.C., section 53.

2. The Supreme Court of Missouri by its approval of Instruction No. 7 denied to petitioner rights granted to

him by the Congress of the United States in enacting the F. E. L. A.

3. If allowed to stand, this decision of the Missouri Supreme Court will frustrate the purpose and intent of the Congress by vitiating the act of Congress abolishing the common law rule of contributory negligence in F. E. L. A. cases.

4. The Missouri Supreme Court's treatment of a federal question of substance involves a question not heretofore determined by this court and that court's decision has disposed of the question presented in a way probably not in accord with applicable decisions of this court.

## ARGUMENT

Since petitioner has been required under this court's rules (Rule 23(e) and (f)) to present a concise statement of the case plus a specification of every stage in the proceedings in the courts below at which, and the manner in which, the federal questions were raised and reserved, petitioner has set out in the appendix hereto substantial portions of his briefs in the Supreme Court of Missouri. No useful purpose would be served by repeating the arguments contained therein in this petition since they had to be and were included in the appendix. The court is, therefore, referred to the Appendix, Page A32, *et seq.*, for petitioner's argument, which is in fact a very concise argument, considering the importance of the question presented.

## CONCLUSION

For the above and foregoing reasons, and by reason of the statutes and authorities cited, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ANTHONY P. NUGENT, SR.,
*Counsel for Petitioner,*

ANTHONY P. NUGENT, JR.,
RICHARD F. ADAMS,
*Attorneys for Petitioner.*

Of Counsel:
WINGER, NUGENT, RAYBURN & ADAMS,
1012 Baltimore Avenue,
Kansas City, Missouri 64105.

## PROOF OF SERVICE

Service upon Respondent's Counsel of Record at their office of the foregoing Petition for Writ of Certiorari and accompanying Appendix is hereby acknowledged this 6th day of August, 1965.

GEORGE L. GORDON,
SAM D. PARKER,
JACK W. R. HEADLEY,
JOSEPH E. STEVENS, JR.,

By .....,
*Counsel of Record for Respondent*
15 West 10th Street,
Kansas City, Missouri.

# APPENDIX

**DIVISION OF THE SUPREME COURT OF MISSOURI**
DIVISION NUMBER TWO

James E. Chance,
Appellant,
v.
Atchison, Topeka and Santa Fe Railway Company, a corporation,
Respondent.

**No. 50416**

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
The Honorable John H. Lucas, Judge

In this suit for personal injuries under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., plaintiff sought damages in the amount of $150,000. The jury returned a verdict for defendant and plaintiff has appealed. The issues on this appeal do not require a detailed statement of the evidence.

On June 19, 1960, plaintiff was employed by defendant as a switchman in the Argentine Switchyards in Kansas City, Kansas, at a place called the "bowl yard" where railroad cars from connecting lines were brought to be distributed to various tracks in the yard depending upon their destination. The procedure followed was for freight cars to be taken to the top or crest of a "hump" and cut loose and permitted to roll into the bowl yard. The speed of the freight cars was controlled by "retarders" regulated by defendant's employees in control towers, who also guided the cars onto the proper track by operating mechanically the switching process. Plaintiff had performed work at track 45, and then walked northward to track 56, where a line of cars was to be pulled out of the yard. On track 55 there were two gondola or hopper cars

located at a place where there was a curve. Plaintiff was asked by some member of the crew on track 56 to locate and replace the "skate," a device to stop or prevent the movement of railroad cars. According to plaintiff, he then walked westward between tracks 55 and 56 to a point just past the first gondola car on track 55. He then saw the skate on the other side of track 56, and he stopped and turned around. He was facing southwest and "practically looking at the car" when he was struck by the first gondola car. He testified that at the time he was not touching or leaning against any car, and he was not in the coupling area between the cars, but was "approximately eight inches or so" distant from the side of the car. Although he was looking at the gondola car he did not see it swing outward or sideways. Plaintiff's theory is that the first gondola car was struck by a freight car which had been routed onto track 55, and because of the excessive speed of the freight car at the time it struck the east end of the gondola car, the west end of the car was caused to swing outward or sideways and strike him. Defendant's evidence established that the two gondola cars were loaded with sand weighing about 75 tons each. The freight car was loaded with flour weighing about 55 to 60 tons. When coming down off the hump and coupling into the standing gondola cars at a speed of four miles an hour, with a skate on the far end of the gondola cars, the freight car would cause the gondola cars to move about 20 to 25 feet. Defendant also introduced evidence that the maximum lateral movement of gondola cars is about two inches, and if they moved sideways or swung out as much as eight inches they would derail. Photographs of a gondola car show that at each end it is narrower in width by about four or five inches, with this narrowing extending back from each end about five feet.

Instruction No. 1, plaintiff's verdict directing instruction, was as follows:

> "The court instructs the jury that if you find and believe from the evidence that the plaintiff, Jim Chance, was in the employ of the defendant on June 19, 1960, and that on that day he was working as a switchman handling freight cars in the Bowl Yard of the defendant at the Argentine Yards in Kansas City, Kansas, and was working below and West of the so-called hump, and that as a part of his regular duties he was in a position on the curve between track 55 and track 56 and West of the 42nd Street Viaduct and that he was then and there violently struck by a hopper car standing on track 55 when it was struck by a car or cars which defendant had caused and permitted to roll off the hump Westward on track 55 at a speed in excess of that allowed by the defendant's rules to-wit four (4) miles per hour, and at an excessive and dangerous rate of speed, and if you further find that, in so causing and permitting said car or cars to roll at such speed off the hump on track 55 and to strike the hopper car standing on track 55, the defendant failed to exercise ordinary care and was negligent and that plaintiff was injured as a direct and proximate result of said negligence, then your verdict must be in favor of the plaintiff and against the defendant."

Defendant offered, and the trial court gave, Instruction No. 7 which was as follows:

> "The court instructs the jury that if you find and believe from the evidence that plaintiff was struck and injured by the movement of a car standing on Track 55 when cars standing on said Track 55 were moved by reason of another car coming off the hump and coupling into them, and if you further find that a speed of four miles per hour was a reasonable and proper speed for a car to so come off said hump and couple into said cars, and that a car so coming off

said hump at a speed of four miles per hour and coupling onto said cars standing on said Track 55, would have caused said cars on Track 55 to move, and if you further find and believe that plaintiff was required to know the operating rules of defendant and that one of said rules required plaintiff to expect a movement of engines or cars on any track at any time in either direction, and if you further find that plaintiff placed himself in a position where he would have been so struck and injured by the movement of said cars on Track 55 caused by the coupling of a car coming off the hump at a speed of four miles per hour, then your verdict will be for the defendant, and this is true even though you may find and believe that said car coming off said hump was moving at a speed greater than four miles per hour."

Plaintiff challenges this instruction by his Point II in his brief which, with the numbers in brackets added, was in its entirety as follows: "The court erred in giving instruction No. 7 at defendant's request and over plaintiff's objections in that said instruction [1] required no finding that plaintiff's acts were negligent, [2] failed to exclude defendant's negligence, [3] was contrary to the law, [4] did not require the jury to find it was the duty of defendant to exercise ordinary care, [5] required no finding of proximate cause and [6] was contradictory and confusing."

Plaintiff's Instruction No. 1 does not hypothesize where he contends he was in relation to the gondola car which struck him except that "he was in a position on the curve between track 55 and track 56." Under this submission he could have been sufficiently in the coupling opening between the two gondola cars so that he would have been struck by the forward movement, or he could have been standing next to one of them. Therefore, this instruction is consistent with the factual contention of plaintiff that he

was standing next to a car, and also with the factual contention of defendant that the gondola car could not have hit him unless he was standing in line with the forward movement of the car. Plaintiff's submission of negligence on the part of defendant is limited by the instruction to a contention that defendant negligently permitted or caused the freight car to roll off the hump "at a speed in excess of that allowed by the defendant's rules to-wit four (4) miles an hour, * * *." In other words, by this instruction plaintiff admits that a speed of four miles an hour, or less, of the freight car would not constitute negligence on the part of defendant. Whether or not defendant may or may not have been negligent in some other respect, plaintiff voluntarily limited his submission of negligence on the part of defendant to permitting the freight car to travel on track 55 at a speed in excess of four miles an hour, and that this negligence was a proximate cause of his injuries.

Defendant was entitled to meet the issues as formulated and submitted by plaintiff. Its position on this appeal is that it attempted to do this by Instruction No. 7, which it contends is a converse instruction of causation. In a converse instruction the defendant may submit either the exact converse of plaintiff's verdict directing instruction, Janssens v. Thompson, 360 Mo. 351, 228 S.W. 2d 743, or the exact converse of any essential element of such instruction. Liebow v. Jones Store Company, Mo., 303 S.W. 2d 660, 662. Such a converse instruction does not require affirmative testimony in support of it. Kimbrough v. Chervitz, 353 Mo. 1154, 186 S.W. 2d 461, 464. The defendant "may also submit facts in an instruction, the existence of which would disprove, that is controvert, one or more of the essential factual elements of plaintiff's case." Liebow v. Jones Store Co., supra. Converse instructions are not limited to an attempt to converse the submission of negligence, but may, as above stated, converse any essential element, such as

injury, Schaeffer v. Accardi, Mo., 315 S.W. 2d 230, or causation, as attempted in this case. What defendant has done by its Instruction No. 7 is to hypothesize a set of facts, admittedly supported by evidence, which if found by the jury would authorize a finding by the jury that the only negligence charged by plaintiff to have been committed by defendant was not a proximate cause of the injuries plaintiff received. The rationale of some cases under the Federal Employers' Liability Act in respect to the inference of negligence on the part of a defendant may be considered to be strained, but an action under the act is based on negligence, and it must be negligence which is a proximate cause of plaintiff's injuries for which he seeks damages.

We shall now examine separately each of the contentions made by plaintiff in his point wherein he challenges Instruction No. 7. An instruction conversing causation, or any other essential element of plaintiff's submission in the case, need not require a finding by the jury that [1] "plaintiff's acts were negligent." This would inject contributory negligence on the part of plaintiff, and of course would be improper in this case. Neither is it necessary that an instruction conversing causation [2] "exclude defendant's negligence." Of course, it must exclude defendant's negligence as a proximate cause of plaintiff's injuries, but Instruction No. 7 does that. Contentions [3] and [6] that the instruction "was contrary to the law" and "contradictory and confusing" are so general and indefinite that they present nothing for appellate review. Domijan v. Harp, Mo., 340 S.W. 2d 728; O'Brien v. City of St. Louis, Mo., 355 S.W. 2d 904, 908; Civil Rule 83.05(e), V.A.M.R. Contention [4] is without merit because a converse instruction need not require the jury to find that defendant had the duty to exercise ordinary care, or whatever degree of care is ordinarily imposed on the defendant. Plaintiff's verdict directing instruction covers this submission. It is not clear what is

intended by contention [5]. Defendant's theory and submission is that its negligence, if any, was not a proximate cause of plaintiff's injury, and that is the result of the findings required by Instruction No. 7. Defendant certainly is not required in an instruction conversing causation to require a finding of causation. We necessarily conclude that there is no merit to any of the various contentions made by plaintiff in his point challenging Instruction No. 7.

From this examination of each contention made by plaintiff in his point, it is obvious that there is no contention, directly or by inference, that he objects to it on the basis that it injects contributory negligence as a defense to an action under the Federal Employers' Liability Act. In fact, the complaint expressly made is that it does *not* require a finding that plaintiff was contributorily negligent. To retain its jury verdict defendant is required only to refute those objections properly and adequately presented by plaintiff. He is not required to defend against possible contentions not advanced by the appealing party. In addition, absent impelling circumstances, see Reyburn v. Spires, Mo., 364 S.W. 2d 589, an appellate court should rule a case only on the issues presented by the parties, and should not convict a trial court of committing error when the contention of error was not presented to it in a motion for new trial and then preserved for appellate review. However, contrary to the specific assignment in his point, plaintiff argues in his brief that Instruction No. 7 injected contributory negligence as a complete defense, and pursuant to Civil Rule 79.04, V.A.M.R., we shall examine this issue to determine whether we should exercise the discretionary review permitted by the rule.

In plaintiff's argument we find this contention: "[I]t is extremely clear in reading the entire instruction that the defendant has availed himself of contributory negligence as a complete defense by the last clause of the in-

struction, to-wit: 'and this is true even though you may find and believe that said car coming off said hump was moving at a speed greater than four miles per hour.' " We fail to see how this clause injects contributory negligence of the plaintiff as a defense. It pertains to acts or conduct of the defendant, not of the plaintiff. Although plaintiff does not so contend, it might be argued that the hypothesization that "plaintiff placed himself in a position where he would have been so struck and injured by the movement of said cars on track 55" impliedly injected contributory negligence on his part, but the instruction does not require or call for a determination by the jury of negligence on the part of plaintiff, and it does not authorize a verdict for defendant on the basis that this act of the plaintiff constituted negligence. We think Instruction No. 7 is too wordy, but its deficiency is in poor draftsmanship; not in substance. Any jury of reasonable understanding would conclude from this instruction that if plaintiff would have been struck and injured by the gondola car if the freight car which struck it had been going only four miles an hour, which the jury was required to find was a reasonable speed and which plaintiff admitted by his Instruction No. 1 would not have been a negligent speed, then the fact that the freight car was permitted by defendant to roll at a greater speed, the only negligence plaintiff has elected to charge against defendant, would not have been a proximate cause of plaintiff's injuries. The jury was not required to make this finding but was authorized to do so based on its evaluation of the evidence. If plaintiff thought the instruction, because of its unnecessary wording, injected contributory negligence on his part as a defense, he did not so advise the trial court at the time the instruction was given, he did not so state in his assignment of errors in his motion for new trial, and he did not advise opposing counsel by making that contention in a point in his brief. In fact, as previ-

ously mentioned, his point contains an assertion to the contrary. He now makes the contention only by an argument in his brief unrelated to any point, and then in his argument he limits his contention to a phrase of an instruction which refers only to acts of the defendant, and which could not pertain to contributory negligence on his part. This is not a situation which calls for any further discretionary review on our part by reason of the provisions of Civil Rule 79.04, V.A.M.R. However, as previously noted, while the instruction contains unnecessary wording, it does not submit any acts of the plaintiff as constituting negligence, and it does not authorize a finding for defendant on the basis of contributory negligence.

Plaintiff also contends that the court erred in excluding evidence offered by plaintiff "to the effect that the railroad car involved in the accident was moving at 'an excessive' rate of speed." The question asked the witness on deposition was this: "Well, how fast would you say that car or cars, whichever you say it was, a car or cars, how fast would say it or they were going?" The answer was permitted to be read to the jury except this phrase: "they were going an excessive rate of speed." Defendant objected to the above phrase because it was a conclusion.

A person, when qualified, may be permitted to testify concerning the speed of a vehicle based on his observations, Brown v. Alton R. Co., 236 Mo. App. 26, 151 S.W. 2d 727, but in this case the witness admitted that he was not a good judge of speed. However, here the witness was not giving his estimate of the speed of the car, but when admittedly not a good judge of speed purported to state his conclusion as to whether the speed of the freight car was "excessive." This was improper for the reason assigned in defendant's objection. It would have been the conclusion of the witness of the ultimate issue before the jury from an unqualified

witness. See comparable situations in Trowbridge v. Fleming, Mo., 269 S.W. 610; Elms v. Kansas City Public Service Company, Mo., 335 S.W. 2d 26. We note also that when the trial court sustained the objection it suggested, in answer to counsel's contention that the answer was admissible in evidence, that counsel for plaintiff "show me a case" which so held, and counsel stated he would "have a trial brief" for the court, and that the case he was relying on was "by the Supreme Court of the United States." The court then said: "I will reserve ruling on that question and we will read it later." As far as shown by the record no trial brief was submitted, but the record does show that the court later refused to permit the answer to be read to the jury. The cases cited to this court are all Missouri cases and are all distinguishable. No prejudicial error occurred.

The final point of plaintiff is that "Pleading, proof and instructing as to defendant railroad's Rule 'N' violated the plaintiff's constitutional rights to equal protection of the laws and was an unjust and unwarranted deprivation of plaintiff's property rights without due process of law." In addition to the fact that this point does not comply with Civil Rule 83.05(e), V.A.M.R., plaintiff does not have a point in his brief that the trial court erred in refusing to strike from defendant's answer the reference to Rule N, and the record indicates that no such motion was made. Neither does plaintiff have a point in his brief that the court erroneously permitted proof of the contents of the Rule. We find no express mention of the Rule in any instruction, and there is no point in plaintiff's brief that any instruction erroneously referred to the Rule. Finally, there is no reference whatever in plaintiff's motion for new trial to any constitutional question, and for that reason any such issue is not preserved for appellate review. Witt v. City of Webster

Groves, Mo., 383 S.W. 2d 723; State ex rel. Williamson v. County Court of Barry County, Mo., 363 S.W. 2d 691.

The judgment is affirmed.

Alden A. Stockard, Commissioner.

Barrett, C., concurs.

Pritchard, C., concurs.

PER CURIAM: The foregoing opinion by Stockard, C., is adopted as the opinion of the Court.

All of the Judges concur.

## EXCERPTS FROM TRANSCRIPT ON APPEAL IN THE SUPREME COURT OF MISSOURI

* * *

[Page 8]

(Under date of May 7, 1963, the following entry appears in the office of the circuit clerk:)

"Now on this day by leave of Court defendant files first amended answer to plaintiff's petition."

### First Amended Answer

Comes now the defendant, The Atchison, Topeka and Santa Fe Railway Company, and by leave of Court makes the following First Amended Answer to plaintiff's petition for damages for personal injuries herein:

[Page 9]

1. Plaintiff's petition fails to state a claim upon which relief can be granted against defendant.

2. Defendant admits all the allegations contained in paragraph (1) of plaintiff's petition.

3. Defendant denies each and every allegation contained in paragraph (2) of plaintiff's petition.

4. Defendant denies each and every allegation contained in paragraph (3) of plaintiff's petition.

5. Defendant denies each and every allegation contained in paragraph (4) of plaintiff's petition.

6. Further answering plaintiff's petition, defendant states that plaintiff's alleged injury at the time and place mentioned in plaintiff's petition, was contributed to or solely caused by plaintiff's own careless and negligent acts in that plaintiff failed to exercise ordinary care for his own safety under the circumstances when he knew, or in the exercise of ordinary care should have known, that at the time and place of the alleged accident he should have expected the movement of trains, engines or cars at any time on the track in either direction.

7. Further answering plaintiff's petition, defendant states that plaintiff's alleged injury at the time and place mentioned in plaintiff's petition was contributed to or solely caused by plaintiff's violation of Rule N of the operating department book of rules then in effect, a copy of which plaintiff possessed, agreed to obey and was gov-

[Page 10]

erned by, said rule being as follows:

"Employees must expect the movement of trains, engines or cars at any time, on any track, in either direction. They are warned they must not rely upon others to notify them of approaching trains, engines or cars."

That plaintiff further contributed to or caused his alleged injury by violating common and accepted safety practices of switchmen and instructions from his superiors, all of which were known to plaintiff at the time, in that

at the time of his accident plaintiff was not in a position from which he could see approaching cars in the bowl yard and from which he would be free of any danger of being struck by moving cars in the said yard.

WHEREFORE, having fully answered, defendant prays to be discharged with its costs.

(Filed May 7, 1962.)

* * *

[Page 11]

**Trial**

The trial began on Monday, May 27, 1963, before the Honorable John H. Lucas, Judge of Division No. 7 of the Circuit Court of Jackson County, Missouri, at Kansas City, and a jury. The plaintiff appeared in person and by Mr. Anthony P. Nugent, Sr., Mr. Anthony P. Nugent, Jr., and Mr. Richard E. Adams, his attorneys. The defendant appeared by Mr. Jack W. R. Headley, and Mr. Joseph E. Stevens, Jr., its attorneys. The following proceedings were had.

**Motion to Strike Pleading**

COMES NOW the plaintiff and moves the court to make and enter its order striking paragraph 7 of defendant's first amended answer herein,

UPON THE GROUNDS THAT:

1. Said paragraph 7 invokes "Rule N" of defendant's operating department book of rules.

2. The invocation of said "Rule N" by defendant is designed to and does, if its use is permitted by this court in the pleading and proof in this case, inject into the trial

of this case the common law defence of contributory negligence as an absolute bar to plaintiff's recovery.

3. This is an action under the Federal Employers' Liability Act. By the provisions of section 53, Title 45, U.S.C.A. the fact that an employee may have been guilty of contributory negligence shall not bar a recovery.

[Page 12]

4. Said pleading of "Rule N" and any attempt to prove it or a violation thereof by plaintiff is an unlawful attempt to evade and subvert the provisions of said section 53.

5. Such evasion and subversion of section 53 by defendant and the allowance by this court of such use of "Rule N" in this case is an invasion and violation of plaintiff's constitutional rights, including his rights to equal protection of the laws, and constitutes an unjust and unwarranted deprivation of plaintiff's property right without due process of law contrary to the provisions of sections 2 and 10 of Article I of the Constitution of Missouri and of section 1 of the Fourteenth Amendment to the Constitution of the United States.

(Filed May 27, 1963.)

(Thereupon the following proceedings were had in the Court's chambers out of the presence and hearing of the jury panel:)

(After oral arguments were presented to the Court by respective counsel, the foregoing Motion to Strike Pleading was by the Court overruled.)

* * *

[Page 318]

[Questions by Mr. Headley, counsel for defendant.]

Q. Mr. Chance, you were not standing back, back in that coupler opening, back between the cars on 55, waiting for that cut of cars to go by at the time this happened, were you?

A. No, sir.

Q. Mr. Chance, down here in this bowl yard these cars are coming down off the hump all the time, is that not correct?

A. Yes, sir.

Q. And isn't it a custom and a rule, Mr. Chance, that a switchman working here in these yards has to expect the movement of these cars or engines or trains from any direction at any time?

MR. NUGENT, JR.: I want to make an objection.

(Thereupon the following out of the hearing of the jury:)

MR. NUGENT, JR.: We are now getting into Rule N, Your Honor.

THE COURT: Rule N?

MR. NUGENT, JR.: Yes. We have previously moved the Court to strike Rule N from the pleadings and not to permit any proof of Rule N or anything which is the same in substance as Rule N to be admitted into evidence.

THE COURT: Is that in the amended answer?

MR. NUGENT, JR.: Yes.

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THE COURT: That is the thing we went over in chambers?

MR. NUGENT, JR.: Yes.

MR HEADLEY: We went over it all, Your Honor.

MR. NUGENT, JR.: I am just preserving my record.

THE COURT: Objection overruled.

(Thereupon the following in the hearing of the jury:)

MR. HEADLEY: Will you read the question back, Mr. Garrett?

(Question read by the reporter.)

A. I could answer that question—

THE COURT: Well, answer it "yes" or "no" and then make your explanation. You have got the opportunity to qualify. Give a yes or no answer and then explain it.

A. Yes, there is cars move in both directions in there.

Q. (By Mr. Headley) All right.

A. But I want a chance to explain why.

THE COURT: Let him explain.

A. In this yard the yardmaster at the bowl yard is supposed to call the hump yard, and the hump yard is supposed—

MR. HEADLEY: (Interrupting) Your Honor, I think that the explanation should be limited—

A. (Interrupting) They are not to—

THE COURT: (Interrupting) Just a minute, Mr. Chance.

MR. HEADLEY: They should be limited to the question and the answer without just an open door for a speech.

THE COURT: Well, the Court didn't intend the explanation to lead to a complete dissertation on how the

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trains operate. I thought that he had some explanation that would be short and would be pertinent but, Mr. Chance, in all fairness, the Court can't permit you to give a complete dissertation on how that bowl yard works. The question was, Aren't switchmen—don't they have knowledge that there are trains moving along and through that bowl yard at all times and you should expect that.

A. Your Honor, the yardmaster runs that.

MR. HEADLEY: Your Honor, let me go ahead and see if he can't answer that question.

THE COURT: All right. Then come back and we will let him make his explanation. I want him to be sure to have that opportunity, Mr. Headley.

Q. (By Mr. Headley) Mr. Chance, as a matter of fact, before you crossed 55 and as you were crossing it that morning, you looked up track 55, didn't you, to see whether or not anything was coming?

A. Yes, sir; I did.

Q. Why did you do that?

A. That is the usual procedure.

Q. Well, why is that the usual procedure?

A. Sometimes when you are going to make a coupling down there or if you are crossing tracks, you always look

up to see if there is any cars coming down, and after that the yardmaster is supposed to see that no cars get in on top of you.

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Q. Is that because cars might come down there at any time, is that why you looked up there?

A. Yes, sir; at first they might.

Q. All right.

THE COURT: Now, let him make his explanation.

MR. HEADLEY: I think he already did.

THE COURT: I think he did, but let him clarify it. You can qualify that "yes" answer by explaining something about the yardmaster.

A. The yardmaster rules over the yards there. If he tells you to go down and do something, you do it or otherwise you are charged with insubordination, which the company has the right to fire you for that.

THE COURT: Very well.

MR. HEADLEY: I move that all that be stricken.

THE COURT: Motion overruled.

* * *

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[Questions by Mr. Headley to defendant's witness Becker]

Q. Does this four miles an hour have any relationship to men working on the tracks or being in the vicinity of cars, keeping the speed down to that?

A. No, sir.

Q. Why is that?

A. Because everyone is supposed to be alert and expect the cars to move on any track at any time in any direction, and they should not—the rules require them to stay clear of any track, foul of any track.

Q. What I am getting at, Mr. Becker: You said somebody—or they must expect cars to move on any track at any time in any direction. Now, who must expect it? Who are we talking about?

A. The men who are working in that yard; anyone that happens to be in that yard should expect a car to be moving in either direction at any time.

Q. All right. And this is because these cars are coming down and can be shot into any track at any time, is that right?

MR. NUGENT, JR.: I am going to object to that as leading, Your Honor.

MR. HEADLEY: All right. I will withdraw it.

THE COURT: It is leading. Objection sustained.

MR. HEADLEY: Your Honor, and Mr. Nugent:—

(Thereupon the following out of the hearing of the jury:)

MR. HEADLEY: At this time we are going to want to put in evidence Rule N, which we pleaded. Now, that Rule N is in this book. I simply intend to hand him the book, which is the operating rules, and have him identify

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only Rule N.

THE COURT: You are not introducing anything but Rule N?

MR. HEADLEY: Not getting all these rules in, no.

MR. NUGENT, JR.: Now, Your Honor—

THE COURT: That won't be passed to the jury. You will read it, if it is admitted.

MR. HEADLEY: Yes.

THE COURT: I haven't passed on the admissibility yet. He is going to offer Rule N only.

MR. NUGENT, JR.: I understand the offer and I object to the offer for the reasons that were set out. I think the Court will remember we went into this thoroughly before the trial.

THE COURT: For the record you better make your objection again. Let the exhibit be marked first and the offer made.

MR. NUGENT, JR.: All right, Your Honor.

MR. HEADLEY: I didn't intend to mark it.

THE COURT: Oh, you didn't?

MR. HEADLEY: No. I merely wanted to have him testify on Rule N.

THE COURT: Well, aren't you going to offer it in evidence? If you are not, why all right. They didn't use it.

MR. HEADLEY: No. That's right.

(Thereupon the following in the hearing of the jury:)

Q. (By Mr. Headley) Mr. Becker, are you familiar with any operating rules with respect to that statement you

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last made, that these people in the yards must expect cars to move in any direction at any time?

MR. NUGENT, JR.: Just a minute, Mr. Becker.

(Thereupon the following out of the hearing of the jury:)

MR. NUGENT, JR.: I wish to make an objection to this question. This question is designed to bring out the rule which is designated as Rule N, to which the plaintiff objected prior to the time of the commencement of the suit—I mean the commencement of the trial, upon the grounds that the injection of Rule N into this lawsuit has a tendency to subvert the intention of the Congress of the United States in passing the Federal Employers Liability Act and its amendments, particularly in that it tends to subvert the intention of the Congress in its enactment with regard to the common law defense of contributory negligence, which defense has been eliminated as an absolute defense by the Act of Congress. To admit into evidence a rule which imposes upon the railroad employee the duty not to be contributorily negligent, which is the effect of Rule N and other rules in this rule book, has a tendency to defeat the purpose of the Act of Congress. I think the Court probably remembers my argument.

THE COURT: No, I don't too well. This question must have been brought up in many cases, railroad cases before. Do you have a case on it?

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MR. NUGENT, JR.: I don't know that it has, Your Honor. I have found no reported cases on it.

THE COURT: I don't agree with your objection that it subverts the action of Congress. It doesn't say that contributory negligence is a defense. It says they are not to do certain things and you have already introduced in evidence and brought out that they have a rule that says that you can't move a car over four miles an hour. In view of

that fact the Court does overrule the objection and permits the witness to answer the question.

MR. NUGENT, JR.: All right, Your Honor.

(Thereupon the following in the hearing of the jury:)

MR. HEADLEY: Do you remember my last question now, Mr. Becker?

A. No, sir; I don't.

MR. HEADLEY: Maybe you better read it back, Mr. Reporter.

(Question read by the reporter)

Q. (By Mr. Headley) Answer that, please.

A. Yes. We have a rule, Rule N of our operating department rules, that states that a person should not—should be alert to movement of cars on any track at any time in either direction.

Q. Mr. Becker, I will show you this rule of the operating department and ask you if you can find Rule N in that book and, if so, if you will read that.

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MR. NUGENT, JR.: Is it understood, Your Honor, that the objection goes to this?

THE COURT: Yes, certainly, certainly. Objection overruled.

A. Yes, Rule N, and it reads: "Employees must expect the movement of trains, engines or cars at any time on any track in either direction. They are warned they must not rely on others to notify them of approaching trains, engines or cars."

Q. (By Mr. Headley) Now, Mr. Becker, are all switchmen or all employees given a copy of these rule books?

A. Yes.

Q. And what is the procedure or the practice of the Santa Fe with respect to checking out employees on these rules?

A. All—

MR. NUGENT, JR.: Now, Your Honor, I am going to object to this. This is not relevant or material unless it is shown, and it may very well be, that this was done with this plaintiff.

THE COURT: The objection will be sustained, unless he can show that they have a receipt from the plaintiff acknowledging that he received a copy of the book.

(Thereupon the following out of the hearing of the jury:)

MR. HEADLEY: We will tie this up, Your Honor. I simply want to show what the practice and custom is with employees, and we will tie it up with this plaintiff.

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THE COURT: If you represent to the Court that you can show that you have a written, signed receipt from him, showing that he received a copy of the rules—

MR. HEADLEY: Oh, yes, yes. We have several of them, and we will bring one of those in.

THE COURT: In view of that fact, then, I think the objection should be overruled. It is overruled.

(Thereupon the following in the hearing of the jury:)

Q. (By Mr. Headley) Tell us, Mr. Becker, what the practice and custom is with employees so far as checking them out on these rules and providing them with copies of these books.

A. All employees when they are hired as switchmen, firemen, engineers, brakemen and conductors are given a copy of this book of rules and required to write a preliminary book and are talked to by the trainmaster before they are permitted to go to work and these particular rules are called to their attention.

Q. And does this apply, giving these rules and books to switchmen working in these yards right here on Exhibit 4?

A. Yes.

* * *

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[Questions by Mr. Headley]

Q. Now, tell me this, Mr. Becker with reference to—getting back to this Rule N, which you identified and which states that "Employees must expect movement of trains, engines or cars at any time on any track in either direction," let me ask you this question: If a switchman was standing on a track—for the purposes of just an example I refer to Plaintiff's Exhibit 4—standing in between the coupler opening of a couple of cars waiting for some cars to go by on another track and he was standing in between that coupler opening, would that be complying with this Rule N?

MR. NUGENT, JR.: Just a minute, Mr. Becker.

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(Thereupon the following out of the hearing of the jury:)

MR. NUGENT, JR.: Your Honor, I am going to object to that question in that it refers to matters which have not been in evidence in this case at all. It is a hypothetical question addressed to this witness.

MR. HEADLEY: In the first place, it would be proper for this witness as an expert in the operation of railroads to testify and explain the meaning of these rules and how they apply to certain situations, and it is explanatory to the jury. For that reason it's a proper question.

THE COURT: Well—

MR. NUGENT, JR.: The rule doesn't require any explanation.

THE COURT: It seems to me it is unfair for him in a case arising under these circumstances, for him to tell the jury what the violation of a rule is. I am going to sustain the objection.

MR. HEADLEY: Now, let me say this, Your Honor: We will supply evidence that this man was standing there.

THE COURT: You are going to have evidence before this jury that this plaintiff before he was hurt—

MR. HEADLEY: (Interrupting) Was standing between—

THE COURT: —or at the time he was hurt?

MR. HEADLEY: Yes; was standing between the coupler opening. It would be proper for an expert to testify that that is a violation of the rule.

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THE COURT: That rule just says that they must be on the alert for cars going in each direction. That doesn't say anything about standing in between a couple of cars.

MR. HEADLEY: That is the point. It is important for somebody who is familiar with the rules of railroading to know what their application is, and the interpretation is for an expert.

MR. NUGENT, JR.: You don't need an expert to explain the meaning of the rule.

MR. HEADLEY: Maybe you don't need one, but—

THE COURT: If there was a rule that said that never at the time of coupling should they stand between two cars, it might be different. I am going to sustain the objection to that, him interpreting the rule to mean that standing in between cars was a violation of Rule N.

MR. STEVENS: He couldn't be expecting to have cars moving in either direction if he is standing in between two cars where he can't see in either direction.

THE COURT: Well, he can argue that.

MR. HEADLEY: May we make this offer of proof?

THE COURT: Yes, sir.

MR. HEADLEY: And may it be so understood—

THE COURT: The objection will be sustained. You make your offer of proof.

[Page 760]

MR. HEADLEY: At this time the defendant offers to prove by this witness that if a switchman was standing between two cars in the vicinity of track 55 west of the Forty-second Street viaduct or any other similarly located track on curve, and standing between two of the cars on this particular track in the coupler opening, that he would not be complying with or following Rule N, as previously put in evidence in this case, said rule requiring that em-

ployee to be on the lookout at all times for cars or trains or engines moving in any direction on any track.

THE COURT: Mr. Nugent, do you object to the offer of proof?

MR. NUGENT, JR.: Yes, Your Honor, I do.

THE COURT: Objection sustained.

* * *

[Page 799]

[Questions by Mr. Headley]

Q. (By Mr. Headley) State whether or not, Mr. Becker, either of those men working in this tower here, Mr. Roedel or anybody else, have any duty to be calling out on the intercom or any other way of communication they have, to the crews working down here with the engines every time they see a car coming down off the hump on one of these various tracks.

A. No, sir. That would be impossible to do that.

Q. All right. Is that why you have Rule N there that employees are to expect cars moving on any track at any time?

MR. NUGENT, JR.: That is objectionable.

MR. HEADLEY: All right.

THE COURT: Sustained.

Q. (By Mr. Headley) Now, Mr. Nugent on cross-examination asked you if it was your opinion that Mr. Chance violated Rule N and you said, "yes." Now, would you tell the jury why it is your opinion he violated Rule N?

A. The only way that a person could get hurt outside of a wreck or an accident in working in between those

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cars or in between the tracks—the only way a person could be hit would be to be afoul of the car and, therefore, standing between the couplers on the cars, if a person were down there—and the men work all the time down on those tracks—if those cars jumped sideways, as Mr. Chance described, we would be having men hurt all the time down there.

MR. NUGENT, JR.: Excuse me, Your Honor. I want to object to this.

THE COURT: I will sustain the objection to that part of the explanation that you would have men hurt all the time. That is a conclusion on his part.

MR. HEADLEY: Your Honor, we didn't open the door on that.

THE COURT: I realize that, but I am not going to let him draw those conclusions.

MR. HEADLEY: All right.

Q. (By Mr. Headley) Omit that part.

A. Well—

Q. I might say this: You said "afoul of the track." What did you mean by that? I think you should clear that up.

A. Afoul of the track would mean at the point where a car comes down the track, the only way a person could be hit is that he would have to be standing where if this were the corner of the car, he would have to be standing out where the car would hit him, or if this were a coupler—were the coupler in here, he would have to be standing in between the couplers there.

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Q. All right. Now, why is that? Standing between the couplers or standing afoul of the track so that if a car moves in the course of the movement it would hit him, why is that a violation of Rule N?

A. Because it is a—

MR. NUGENT, JR.: Your Honor, I object to this. I think the Court ruled on this, that this is direct examination and it does not permit this question to be asked. I don't think that there is anything in cross-examination that makes this question—as to whether or not Rule N is applicable to this situation or any more relevant now than it was then.

THE COURT: You asked him on cross-examination if in his opinion he had violated Rule N.

MR. NUGENT, JR.: I understand that, Your Honor.

THE COURT: And he said, "yes". I think it is only fair to let him explain why he has an opinion that he did violate Rule N. You have opened it up on cross-examination.

Q. (By Mr. Headley) Now, go ahead, Mr. Becker, and tell us why a man standing like that in between the coupler openings or afoul of the track, why that is a violation of Rule N.

THE COURT: In your opinion.

Q. (By Mr. Headley) In your opinion; yes, sir.

A. Because standing in that way he can't see either way down the track, see a car that might be coming toward him, and because it is a hazard to himself. He couldn't

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stand—he couldn't tell, if he were standing between the couplers—he couldn't see cars or an engine from either direction coming into the track.

Q. My question is, then, with reference to the specific language of Rule N, and what it says, why that is a violation?

MR. NUGENT, JR.: Your Honor, he just answered that question.

THE COURT: I think he has answered it. Objection sustained.

* * *

[Page 1094]

THE COURT: Let the record show that the plaintiff offers and the Court gives Instructions numbered 1, 2, 3, 4 and 5, and further that the defendant offers and the Court gives Instructions numbered 6, 7, 8, 9, 10, 11, and 12, and that the Court gives Instruction No. 13, being form of verdict, and further that the plaintiff offers and the Court refuses Instruction No. 14.

MR. HEADLEY: At this time on behalf of the defendant, Your Honor, the defendant objects and excepts to each of the plaintiff's instructions, being numbered 1 through 5.

MR. NUGENT, JR.: At this time, Your Honor, the plaintiff objects and excepts to each of the defendant's instructions, numbered 6 through 12.

* * *

[Page 1104]

Thereafter and on June 22, 1963, plaintiff filed his motion for new trial as follows:

**"Plaintiff's Motion for New Trial**

"Comes now the plaintiff and moves the court to set aside the verdict herein and to grant him a new trial for the following reasons:

* * *

"3. Because the court erred in overruling plaintiff's motion to strike paragraph seven of defendant's first amended answer in pre-trial conference.

* * *

[Page 1105]

"8. Because the court erred in permitting counsel for defendant to question witnesses regarding the substance of and the wording of defendant's work rule 'N'.

* * *

[Page 1106]

"14. Because the court erred in giving instruction No. 7 offered by defendant in that said instruction assumed facts not in evidence, was argumentative, required no finding of negligence, required no finding of proximate cause, referred to defendant's work rule 'N', was contrary to the law, commented on the evidence, did not require the jury to find that defendant was free of negligence, did not require the jury to find that the plaintiff was guilty of negligence or contributory negligence, did not require the jury to find that it was the duty of the defendant to exercise ordinary care, and in that said instruction was contradictory and confusing.

## EXCERPTS FROM APPELLANT'S STATEMENT, BRIEF AND ARGUMENT IN THE SUPREME COURT OF MISSOURI

* * *

II

**The court erred in giving Instruction No. 7 at defendant's request and over plaintiff's objections in that said instruction required no finding that plaintiff's acts were negligent, failed to exclude defendant's negligence, was contrary to the law, did not require the jury to find it was the duty of defendant to exercise ordinary care, required no finding of proximate cause and was contradictory and confusing.**

The instant action was under the Federal Employers' Liability Act, Title 45, Section 51 *et seq.*, U.S.C.A. Section 53 of said act provides, in effect, that contributory negligence of the employee is not a bar to his recovery but that damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employee.

It is difficult to determine exactly the type of instruction defendant has given in Instruction No. 7 (Tr. 1097, 1098). It purports to be a verdict directing instruction and contributory negligence all in one. However, it is extremely clear in reading the entire instruction that the defendant has availed himself of contributory negligence as a complete defense by the last clause of the instruction, to-wit:

> "and this is true even though you may find and believe that said car coming off said hump was moving at a speed greater than four miles per hour."

This is contrary to the law. The court is instructing the jury that regardless of the acts of defendant, you must

find for defendant if you find that plaintiff committed certain acts as set forth in the instruction.

In the case of *Terrell* v. *Missouri-Kansas-Texas R. R. Co.*, (Mo.) 303 S.W.2d 641, there was a suit for personal injuries under the Federal Employers' Liability Act. The jury returned a verdict for the defendant and the plaintiff appealed.

The evidence in the case was that the plaintiff, Ralph Terrell, was a brakeman in defendant's employ. The accident occurred on January 17, 1955, at Atoka, Oklahoma. The train had stopped to drop off one car and pick up three others; it stopped on the main track headed south. South of where the train stopped, there was an interchange track which ran to the northwest and a spur track. Three cars to be picked up were on one of three spur tracks. The principal controversy arose over the making and the manner of making of a "drop switch" or "flying switch" of these cars by which they were connected to the head end of the standing train. When the train stopped the plaintiff was instructed to and did uncouple a car. While in the process of making the switch, the plaintiff was to brake the three cars upon which he was riding. He waited to brake the cars until he was close to the standing train and the brake didn't reduce the speed of the cars and the plaintiff was injured.

The defendant claimed error in the giving of defendant's instruction number 5. This instruction reads as follows:

> "The court instructs the jury that if you find and believe from the evidence that said drop switch was made at such a speed and such a location and under such circumstances that plaintiff could, in the exercise of ordinary care and in the proper discharge of his duties, have controlled the movement of said cars so

that when reaching the train they would not have been doing in excess of 4 miles an hour, then your verdict must be in favor of defendant."

The court held that the instruction was erroneous and reversed and remanded the case for a new trial.

The court stated at page 646 as follows:

". . . It will immediately be seen that this instruction submitted only defendant's acts in the *manner* of making the drop switch, and whether plaintiff could, under those circumstances, have controlled the movement and slowed the cars to a speed of four miles per hour; this is a verdict directing instruction. Plaintiff's 'Points' and argument on this instruction are not overly helpful, but they are sufficient to raise the questions we discuss.

"It is almost elementary that a verdict-directing instruction may not ignore issues of negligence shown by substantial evidence. . . . This instruction completely ignored the claim that defendant was negligent in not making a 'power-controlled' switching movement with the available facilities at hand. There was substantial evidence to make this an issue, regardless of the reasons given by defendant's witnesses against using that method here. Perhaps this objection might have been obviated by a requirement in the instruction that the jury find that the drop switch was, on this occasion and on hypothesized facts, a reasonably safe method of procedure. The instruction nowhere excludes negligence on the part of the defendant; it does not purport to be framed as a sole cause instruction, nor is it sufficient as such. It erroneously permits a consideration of mere contributory negligence (*though not designated as such*) on plaintiff's part as a complete bar to any recovery. Teague v. Plaza Express Co., 356 Mo. 1186, 205 S.W.2d 563, 567. *This, of course, is never permitted in a case under the Federal Employers' Liability Act.* Further, even as to the manner of making the drop switch this instruction does not hypothesize

> the facts, although some of the fact questions involved were vigorously controverted. See generally, for the necessity of hypothesizing the facts on controverted issues: Hooper v. Conrad, 564 Mo. 176, 260 S.W.2d 496; Ferguson v. Betterton, 364 Mo. 997, 270 S.W.2d 756; Ketcham v. Thomas, Mo., 283 S.W.2d 642. . . ." (Emphasis supplied).

Defendant in seeking to uphold the erroneous instruction relied largely upon a concluding paragraph in plaintiff's instruction No. 1, which required the jury to find the defendant was negligent in one or more of the submitted particulars and that such act or acts was the approximate cause of the cars colliding with the stationary train with such force, speed or violence as to injure plaintiff. The court stated at pages 647, 648 as follows:

> "We do not think that counsel's present argument answers validly the objections that instruction No. 5 fails to exonerate defendant of negligence, that it is certainly not good as a sole cause instruction, that it permits a verdict for defendant upon a finding of contributory negligence of plaintiff, and that it does not sufficiently hypothesize the facts, even on the issues which it purports to cover. . . ."

Instruction No. 7 does not hypothesize sufficient facts. It permits a verdict for defendant upon a finding of contributory negligence of plaintiff, which is contrary to the law. It fails anywhere to exonerate or exclude defendant's negligence. It fails as a sole cause instruction. It even fails to require the jury to find that the act of the plaintiff in placing himself in a position where he might be struck was negligent and if such an act was negligent that it was a proximate cause of the accident.

The instruction is not a sole cause instruction because it does not exclude defendant's negligence. Further, it states that if plaintiff placed himself in the position men-

tioned he cannot recover even though the jury might find that the speed of the car coming off the hump was "greater than four miles an hour."

The evidence was that plaintiff while standing between tracks 55 and 56 was struck by a car that had been standing on track 55 and knocked into track 56. (Tr. 150, 151). The cars that struck the standing cars on track 55 were moving pretty fast. (Tr. 69, 84, 85). Even if plaintiff was negligent he had a right under the law to have such negligence considered in diminishing damages and not as a complete bar to his recovery. Not only does Instruction No. 7 ignore any claim that the defendant was negligent in allowing cars to come off the hump at a speed that was "pretty fast," it completely and specifically exculpates defendant from any liability by the last clause of the Instruction. This instruction directs a verdict for defendant if any act of plaintiff contributed in any degree to the accident *regardless* of the speed of the car coming off the hump. The instruction is contrary to the law as set forth in Title 45, Section 53, U.S.C.A.

In the case of *Wehrli* v. *Wabash Railroad Company,* (Mo.) 315 S.W.2d 765, there was an action against the railroad under the Federal Employers' Liability Act for injuries sustained when a signal maintenance one-man inspection railroad car collided with an automobile at a crossing. A judgment was rendered in favor of the plaintiff in the amount of $40,000 and the defendant appealed. Judgment was affirmed. The court said that it could be conceded that if both the plaintiff and the automobile driver were clearly negligent, each in failing to look, or having looked, in failing to see what was plainly visible, both then were negligent. The court stated, however, at page 772:

> ". . . this does not relieve the defendant if it was even slightly negligent, according to the Rogers and other cases cited. The Act provides that the em-

ployee's negligence does not bar recovery, but that damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. . . ."

The defendant also alleged error in the refusal of the trial court to give its Instruction No. B. This instruction was based on the violation of Rule 299 set out in the case. The offered instruction told the jury that if it found that the plaintiff did not operate the motor car "under complete control and did not operate it at such reduced speed as would prevent an accident; or if you find that he did not stop and push the car over the crossing, and that in so failing, if you find he did so fail, plaintiff violated such rule; then if you find and believe from the evidence that the violation, if any, of such rule by the plaintiff was the sole cause of his injuries; or if you find that the collision resulted solely from such violation, if any, of said rule by plaintiff, and from the negligence of Feneley Pope, as set out in another instruction herewith given you; and that defendant was not negligent in any of the respects mentioned in instruction No. One herewith given you, then, and in such event, your verdict must be against the plaintiff and in favor of the defendant."

The defendant contended that the instruction properly submitted a defense to which it was entitled, that is, the violation of the rule. On the other hand, the plaintiff contended the instruction was erroneous because there was no substantial evidence on one of the points and also because the instruction did not require a finding that a violation of the rule constituted negligence.

The court stated at page 775 as follows:

"[14] Generally, the violation of a company rule does not constitute negligence or contributory negligence as a matter of law. Mech v. Terminal Railroad

> Ass'n, 322 Mo. 937, 18 S.W.2d 510, 515; Teets v. Chicago, South Shore and South Bend Railroad, 7 Cir., 238 F.2d 223, 226. The rule is stated in 57 C.J.S., Master and Servant, Sec. 537 (7), pp. 229-230, as follows: 'The question as to whether the servant was guilty of negligence in violating a rule, or disobeying an order, of the master, is one of fact for the determination of the jury, unless the evidence is such that there is no reasonable ground for a difference of opinion as to such fact.' The effect of the instruction as offered was to declare that the violation charged was negligence as a matter of law."

Instruction No. 7 in the instant case declared that the violation by plaintiff of defendant's rule requiring plaintiff to expect a movement of engine or cars on any track at any time in either direction precluded plaintiff from recovery. It did not allow plaintiff's damages to be diminished by the amount of negligence attributable to plaintiff. It did not require the jury to find that plaintiff's act or acts violated the railroad rule and was thereby negligent. The instruction was to the effect that if plaintiff violated the rule he was negligent as a matter of law. It did not present specifically to the jury the question of whether or not plaintiff was guilty of *negligence* in violating the rule but merely stated that if plaintiff violated the rule he could not recover, even if defendant was negligent. The violation of a company rule does not constitute negligence as a matter of law. The court erred in not submitting the question of negligence in violating the rule to the jury.

*Headrick* v. *Kansas City Southern Railway Co.*, Mo. Sup., 305 S.W.2d 478, was an action by the plaintiff against the defendant under the Federal Employers' Liability Act wherein a verdict was rendered for the plaintiff. The defendant complained of error in the giving of plaintiff's

verdict directing instruction. The court, in finding that the verdict directing instruction was erroneous, stated at page 484:

> "The instruction first informed the jury that Johnston 'negligently and carelessly' caused the bar handle to strike the rail aligner with great force and violence et cetera and then required the jury to find that Johnston 'thereby failed to exercise ordinary care.' This was in the nature of an abstract statement of law. 'Negligence' was defined in another instruction to mean 'a failure to use ordinary care.' If Johnston's acts were negligently and carelessly done as hypothesized in the instruction, he, of course, failed to exercise ordinary care. *The instruction should submit sufficient facts to support a finding of negligence and then direct the jury to determine whether the submitted facts constitute negligence, the jury being free to consider all the evidence bearing on the issue. . . .*" (Emphasis supplied).

The verdict directing instruction should submit sufficient facts to support a finding of negligence and then direct the jury to determine whether submitted facts constitute negligence. In Instruction No. 7 there were facts stated in regard to the acts of the plaintiff but no direction to the jury to find whether or not the stated acts were negligent. The instruction states that if you find that plaintiff placed himself in the position mentioned he cannot recover. There is no requirement that the jury find that in so placing himself the plaintiff was negligent.

In the case of *Nussbaum* v. *Kansas City Stock Yards Co. of Maine*, (Mo.) 359 S.W.2d 335, there was an action by an employee against the employer for personal injuries. After finding that the Kansas Workman's Compensation Law was not applicable since the employer was not engaged in a hazardous occupation within the meaning of the Kansas statute, the court went on to the defendant's

allegations of error in refusing offered Instruction 10. This instruction was on plaintiff's contributory negligence saying that if Workman's Compensation Act was inapplicable, the defendant was entitled to submit the defense. The court stated that "defendant was required to submit a correct instruction on contributory negligence and we find Instruction 10 was defective." The court stated at page 339:

> ". . . In Perkins v. Kansas City Southern Ry. Co., 329 Mo. 1190, 49 S.W.2d 103, 108, concerning submission of a defendant's specifications of contributory negligence of the plaintiff, we said: 'These specifications should be submitted in such a way that the jury may determine (1) whether they be true or false, (2) whether they constitute negligence under the surrounding facts and circumstances in evidence, and (3) whether they concurred with the negligence of defendant as a direct, proximate, and efficient cause or causes of the injuries and death complained of.' The offered instruction did not require a finding that the specifications submitted constituted negligence and submitted proximate cause in a somewhat indefinite manner."

This is another instance where the Supreme Court has found that the offered instruction did not require a finding that the specification submitted constituted negligence. It is incumbent upon the court to insure that an instruction submitted to the jury requires a finding that the specifications are true or false and also whether said specifications constitute negligence under the surrounding facts and circumstances in evidence. Instruction No. 7 failed to so require.

Also see the case of *Perkins* v. *Kansas City Southern Ry. Co.*, Mo. Sup., 49 S.W.2d 103, where the Supreme Court stated as follows at page 107:

". . . Defendant had the right to present its own pleaded theory of plaintiff's contributory negligence and ask separate instructions on its several specifications, although we have indicated that it is better practice to submit all such facts in one instruction. Lange v. Ry. Co., 208 Mo. 458, 478, 106 S.W. 660. These specifications should be submitted in such a way that the jury may determine (1) whether they be true or false, (2) whether they constitute negligence under the surrounding facts and circumstances in evidence, and (3) whether they concurred with the negligence of defendant as a direct, proximate, and efficient cause or causes of the injuries and death complained of. In view of the fact that this case is to be retried it is perhaps enough to say that while defendant in submitting its specifications of contributory negligence need not burden such instructions with specific recitals of all the facts and circumstances in evidence that the jury have a right to consider in connection with this issue, yet defendant's instructions should not be so framed as to preclude the jury from considering such facts and circumstances. . . ."

In the case of *Danner* v. *Weinreich,* (Mo.) 323 S.W.2d 746, there was an action by the plaintiff for damages. Judgment was entered for the defendant and the plaintiff appealed. The court in reversing and remanding the case stated that the giving of certain instructions was in error. The court stated at page 750 as follows:

"Instructions on contributory negligence should require findings that plaintiff was guilty of the act of commission or omission attributed to plaintiff; that such conduct constituted negligence on plaintiff's part, and that this negligence of plaintiff, if any, directly contributed to plaintiff's injury; that is, plaintiff's negligence entered into and formed a part of the direct, producing or efficient cause of the injury, without which the casualty would not have happened. Stumpf v. Panhandle Eastern Pipeline Co., 354 Mo. 208, 189

S.W.2d 223, 227 [7-10], and authorities cited; Mahaney v. Kansas City, Clay County & St. Joseph Auto Transit Co., 329 Mo. 793, 46 S.W.2d 817, 821 [7]; Annotation, 102 A.L.R. 411."

Instruction No. 7 given at defendant's request was prejudicially erroneous. It was contrary to the law in that it made plaintiff's acts a complete bar to his recovery. It did not exonerate defendant of negligence and stated in effect that regardless of what defendant did plaintiff could not recover if plaintiff had placed himself in a position in violation of one of defendant's rules. It made a violation of defendant's rule a bar to recovery without requiring the jury to find that plaintiff was guilty of negligence in violating said rule.

Further, defendant's instruction failed to even meet the bare, minimum requirements of this court as to instructions. It failed to submit to the jury whether or not the specifications (1) were true or false, (2) whether they constituted negligence under the surrounding facts and circumstances, and (3) whether they were a proximate cause.

III

**Pleading, proof and instructing as to defendant railroad's Rule "N" violated the plaintiff's constitutional rights to equal protection of the laws and was an unjust and unwarranted deprivation of plaintiff's property rights without due process of law.**

Section 53 of the Federal Employers' Liability Act outlaws contributory negligence as a complete bar to recovery. Defendant's only reason for pleading and proving Rule "N" of its operating rules was to introduce said rule as a complete bar. This was made evident by Instruction No. 7 which instructs the jury that if plaintiff placed himself in a certain position he was not entitled to recover

*regardless* of what else defendant may have done. This violated plaintiff's constitutional rights. Sections 2, 10, Article I, Constitution of Missouri. Section 1, Amendment 14, U. S. Constitution.

## APPELLANT'S REPLY BRIEF IN THE SUPREME COURT OF MISSOURI

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## ARGUMENT

### I.

**Defendant's Instruction No. 7 Can Only Be Considered As a Contributory Negligence Instruction and Erroneous under the Law.**

> "And this is true even though you may find and believe that said car coming off said hump was moving at a speed greater than four miles per hour."

Defendant in its brief completely ignores these words which appear at the end of defendant's Instruction No. 7. It is this tail on the instruction that makes the instruction a contributory negligence instruction and it is this tail that ends up wagging the dog.

Instruction No. 7 asked the jury to find that the speed of four miles per hour was reasonable and proper for a car to come off the "hump", to find that plaintiff was required to know the operating rules of defendant and said rules required plaintiff to expect the movement of cars, that if plaintiff placed himself in the position that he would have been so struck and injured by the movement of said cars, he is not entitled to recover *and this is true even though defendant may have been negligent.* No other construction can be given to this Instruction No. 7 but to say that

it is a contributory negligence instruction and therefore erroneous. Defendant in said instruction asked the jury to find that a speed of four miles per hour was reasonable and proper and then states that if plaintiff was negligent he is not entitled to recover even if the jury finds that the car was moving at a speed greater than what the defendant stated was a reasonable and proper speed (to-wit, a negligent speed).

The court's attention is specifically directed to defendant's argument at the bottom of page 17 and the top of page 18 of defendant's brief. The defendant states that the jury had to find one of two things: "Either (1) that defendant was not negligent, or (2) that the negligence *was immaterial* because plaintiff put himself in the position where he would have sustained the same injury if defendant had not been negligent." This No. (2) is clearly a violation of Section 53 of the Federal Employer's Liability Act and makes contributory negligence a complete bar to plaintiff's recovery in this case. Defendant has admitted in its argument, its reliance on contributory negligence of plaintiff as a complete bar.

The court's attention is also directed to the analogy appearing in the first full paragraph at the top of page 18 in defendant's brief. This paragraph is set out in full for the convenience of the court:

> "Let us assume that a train is moving at 10 miles per hour, which is a proper speed, but that if it had been moving at 50 miles per hour, such speed would have been excessive and negligent. Assume further that a person puts himself on the track in front of the train so that he is run over and gets his leg cut off and that he would have been so injured by a train going either 10 or 50 miles per hour. What difference does it make if the train is going 10 miles an

hour or 50 miles an hour? The negligence is simply not the cause of the injury."

Defendant asks "What difference does it make if the train is going 10 miles an hour or 50 miles an hour?" The difference is that under F.E.L.A. the contributory negligence of the plaintiff is to be considered only in diminishing damages and is not to be considered a complete bar to his recovery. If the train was moving at an excessive and negligent speed of 50 miles per hour and the person involved in the accident was covered under the Federal Employer's Liability Act, then the contributory negligence of plaintiff could not be a complete bar to his recovery but could be considered only in diminishing the damages of plaintiff.

It is interesting to note that the case of *Liebow* v. *Jones Store Company,* 303 S.W.2d 660, 662, relied upon strongly by the defendant and mentioned throughout its brief states that there is no set form for what is referred to as a converse instruction. After stating this the court reversed the verdict for the defendant on the basis of error in this same instruction because it did not meet the requirements of a converse instruction.

Defendant in its brief cites the case of *McCormick* v. *Kansas City,* Mo. Sup., 262 S.W.2d 868, on page 16. This case is not in point because it does not involve an action under the Federal Employer's Liability Act. The approved converse instruction in the *McCormick* case is no way similar to Instruction No. 7 in this case. It was not an action by the plaintiff against his driver for injuries but an action against the City of Kansas City and is not in point. The question involved was not whether plaintiff's driver was driving at a speed up to 20 miles per hour or in excess thereof, but only involved a case against the City for allowing a hole to be its street.

A common sense reading of the confusing and contradictory Instruction No. 7 given by the defendant herein can only result in the interpretation that the court instructed the jury that if they found that the plaintiff placed himself in a position where he might be hurt, that the verdict of the jury must be for the defendant, even if defendant was negligent.

As defendant's Brief states at page 17, Instruction No. 2 did instruct the jury regarding the plaintiff's contributory negligence and its effect on plaintiff's claim for damages. Defendant neglects, however to note the fact that that part of Instruction No. 2 cannot be reconciled with Instruction No. 7. The two are in direct conflict, so that even if No. 7 did not violate the Federal Employers Liability Act, as it does, No. 7 would be erroneous. It is erroneous for a court to give conflicting instructions. *Jones* v. *Hughey,* Mo. Sup., 283 S.W.2d 550.

II.

**Plaintiff Raised Certain Constitutional Questions at the Earliest Possible Time, the Questions Were Preserved for Appeal and Were Adequately Briefed.**

Defendant contends in its brief that plaintiff failed to raise constitutional questions at the earliest possible time and failed to present said questions in his motion for new trial. Defendant first injected Rule "N" of defendant's rules in this case in paragraph 7 of defendant's First Amended Answer filed on May 7, 1963, over two years after plaintiff's petition was filed. (Tr. 3, 8). Plaintiff moved to strike paragraph 7 of said amended petition and plaintiff set up certain constitutional questions in a specific manner. (Tr. 11, 12). It is difficult to see how defendant can contend that plaintiff did not raise constitutional questions at the earliest possible time when plaintiff's mo-

tion to strike raised said questions only three weeks after Rule "N" was injected into the case by defendant and also prior to the trial.

The constitutional questions were again raised in plaintiff's motion for new trial. Paragraph 3 of the new trial motion states: "3. Because the court erred in overruling plaintiff's motion to strike paragraph seven of defendant's first amended answer in pre-trial conference." This clearly preserves the constitutional questions for appeal.

Plaintiff believes that the violation of his constitutional rights was adequately covered in his brief. However, plaintiff states that he was guaranteed certain property rights under the Federal Employers Liability Act. Section 53 of said Act provides that contributory negligence is not a complete bar to recovery. Defendant injected contributory negligence into the case and in its Instruction Number Seven made such negligence a complete bar to plaintiff's recovery, thus making clear defendant's intention for the original injection of said rule. To allow contributory negligence to be a complete bar to plaintiff's recovery is clearly an unjust and unwarranted deprivation of plaintiff's property rights without due process of law. Ergo, plaintiff's constitutional rights were violated.

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

## No. 546

JAMES E. CHANCE,
*Petitioner,*

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

## BRIEF FOR RESPONDENT IN OPPOSITION

GEORGE L. GORDON, JR.,
SAM D. PARKER,
JACK W. R. HEADLEY,
JOSEPH E. STEVENS, JR.,
15 West Tenth Street,
Kansas City, Missouri 64105,
*Attorneys for Respondent.*

Of Counsel:
LATHROP, RIGHTER, GORDON & PARKER,
15 West Tenth Street,
Kansas City, Missouri 64105.

E. L. MERSERHALL, INC., 1108 Oak Street, Kansas City, Mo. 64106, HArrison 1-8930

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

## BRIEF FOR RESPONDENT IN OPPOSITION

This brief is filed on behalf of The Atchison, Topeka and Santa Fe Railway Company, Respondent, in opposition to Petition of James E. Chance for writ of certiorari to the Supreme Court of the State of Missouri to review the judgment of said court, entered April 12, 1965, affirming the unanimous jury verdict and judgment thereon for this respondent in the Circuit Court of Jackson County, Missouri, at Kansas City. Petitioner's motion for rehearing or transfer to the Missouri Supreme Court, *en banc,* was overruled on May 10, 1965. *Chance* v. *The Atchison, Topeka and Santa Fe Railway Co.* (Mo., 1965), 389 S.W.2d 774.

## JURISDICTION

Petitioner claims jurisdiction of this Court is invoked by virtue of the certiorari provisions of 28 U.S.C., Sec. 1257.

Respondent objects to the jurisdiction of this Court to grant a writ of certiorari because Petitioner has failed to comply with Section 2101(c) of Title 28 U.S.C., and Petitioner has failed to comply with Rules 21 and 22 of this Court.

I. *Failure to Comply with Section 2101(c) of Title 28 U.S.C.*

The petition states (p. 2) that the judgment of the Supreme Court of Missouri was entered on April 15, 1963, and a motion for rehearing was denied May 10, 1965. 28 U.S.C. 2101(c) provides that a writ of certiorari shall be applied for within ninety days after the entry of the judgment. The ninety-day period after May 10, 1965, expired August 8, 1965, and during this period petitioner did not apply for the writ. This Court cannot, therefore, issue such a writ. *Citizen's Bank* v. *Opperman*, 39 S. Ct. 330, 249 U.S. 448.

Neither was the case docketed within the ninety day period, and this again is fatal. *Green* v. *Elbert*, 11 S. Ct. 188, 137 U.S. 615.

II. *Failure to Comply with Rules 21 and 22 of this Court.*

Rules 21(1) and 22(3) require the filing of a petition and certified transcript of the record within the time prescribed by law.

Respondent is informed and believes that the petition in this cause was not filed until August 10, 1965, and that the certified transcript of the record (nor any part thereof) was not filed until September 8, 1965. Respondent is further informed and believes that the cause was not docketed until September 8, 1965, well beyond the ninety-day limitation of the statute and the rules.

Since petitioner has failed to comply with the applicable statute and rules, this Court has no jurisdiction and this petition should be dismissed or denied. However, we will demonstrate that in no case should a writ be issued.

## QUESTIONS PRESENTED

**As to Procedure:** Should this Court now consider the sole question raised by petitioner (that a jury instruction improperly injected contributory negligence as a complete bar to recovery) when petitioner failed to raise such question at the time the jury instruction was given by the trial court (1094), failed to raise such question in his assignment of errors in his motion for new trial filed in the trial court (T. 1104-08), as required by Missouri Rule of Civil Procedure 79.03, and failed to raise such question in "Points Relied On" in his brief to the Missouri Supreme Court (page A 32, Petition), as required by Missouri Rule of Civil Procedure 83.05(a).

**As to the Substantive Issue:** Whether a jury instruction conversing petitioner's sole theory of causation improperly injected contributory negligence as a complete bar to petitioner's recovery and in violation of 45 U.S.C., Sec. 53?

## STATEMENT

Because petitioner's statement of facts fails to tell this Court what petitioner's theory of negligence was at trial, and because the statement is otherwise incomplete, defendant makes this additional statement of the case and facts material to a consideration of the questions presented.

Petitioner testified that on June 19, 1960, he was standing between track 55 and track 56 on a curve in respondent's bowl yard when a car or cars coupled into two standing coupled hopper cars on track 55 causing one of these standing hopper cars to jump out sideways 8 inches or so and hit him causing him injuries (T. 149, 150, 296, 297). Petitioner further stated that any time you put pressure on a string of cars there is a side swing to cars, and if it's on a curve, they will swing either way, about 8 or 10 inches or approximately a foot of side swing. It all depends on how much pressure there is on the cars (T. 290).

Petitioner's sole theory of negligence submitted to the jury was that the moving car or cars coupled into the standing hopper cars at a speed in excess of the 4 miles per hour allowed by respondent's work rules, and that such excessive speed caused the injury. Petitioner's verdict-directing instruction given by the trial court reads as follows:

**"Instruction No. 1**

"The court instructs the jury that if you find and believe from the evidence that the plaintiff, Jim Chance, was in the employ of the defendant on June 19, 1960, and that on that day he was working as a switchman handling freight cars in the Bowl Yard of the defendant at the Argentine Yards in Kansas City, Kansas, and was working below and West of the so-called hump, and that as a part of his regular duties

> he was in a position on the curve between track 55 and track 56 and West of the 42nd Street Viaduct and that he was then and there violently struck by a hopper car standing on track 55 when it was struck by a car or cars which defendant had caused and permitted to roll off the hump Westward on track 55 at a speed in excess of that allowed by the defendant's rules to-wit four (4) miles per hour, and at an excessive and dangerous rate of speed, and if you further find that, in so causing and permitting said car or cars to roll at such speed off the hump on track 55 and to strike the hopper car standing on track 55, the defendant failed to exercise ordinary care and was negligent and that plaintiff was injured as a direct and proximate result of said negligence, then your verdict must be in favor of the plaintiff and against the defendant." (T. 1094-95).

Petitioner did not see the moving cars which coupled into the standing hopper cars (T. 300). Nor did he see the standing hopper car "swing out" and hit him (T. 297, 299). No one testified for petitioner, other than petitioner himself, that standing cars swing out in such fashion when moving cars couple into them.

Several witnesses for respondent testified that railroad cars, including hopper cars, do not swing out, sway out or jump out as much as 8 to 10 inches or a foot during a coupling of these cars coming off the hump, whether on straight or curved track (T. 747, 752, 756-757, 821-822, 835-836, 905-906, 922-923, 1049). Further, witnesses for respondent explained why, because of the manner of car construction and close clearance problems in railroading, it was impossible and impracticable for cars to have such lateral or sideways movement (T. 1049-1051, 755, 757). The maximum lateral movement of these cars is about 2 inches at most, and if they moved sideways or swung out as much as 8 inches they would derail (T. 822, 752-753, 907).

The two hopper cars standing on track 55 at the time in question were loaded with sand weighing about 75 tons each (T. 771, 773). The other car was loaded with flour weighing about 55 to 60 tons (T. 775-776). A loaded car coming down off the hump and coupling into these two standing hopper cars at a speed of 4 miles per hour, with a skate on the far end of the hopper cars, would cause the hopper cars to move at least a half car length or about 20 to 25 feet (T. 777).

Adjoining sets of railroad tracks on a curve are placed farther apart than adjoining sets of track on straight-a-way (T. 784). Measurements show that at the curve between tracks 55 and 56 the distance between tracks is wider than at other points (T. 813-814).

Petitioner told respondent's safety supervisor Storey, on the same day the accident occurred, that "he was standing at the coupler opening *on track* 55 between two hopper cars, and that a car came down off the hump and struck these cars, and he was hit by one of the cars on the right side, and that it threw him over into the cars on 56 track" (T. 834). If you stand on a track where there are two hopper cars on that same track, and if you are standing on that track at the coupler opening, you are in a position where you will be struck if the cars are moved (T. 851-852).

The petitioner previously sued this respondent claiming total permanent disability as the result of an accident on June 24, 1951. This case went to trial in May, 1952, and petitioner was awarded $20,000 damages by a jury based on petitioner's testimony that he would never be able to work again as a switchman as well as the testimony of his doctors who stated he would never be able to work again (T. 333-335, 345-346). In August, 1952, a little over two months after the said jury verdict, and after the judg-

ment entered thereon was paid to petitioner, petitioner filed a written bump with respondent demanding that he be put back to work as a switchman stating that he was ready, willing and able to work (T. 1041-1042, 1036-1037, 346-347). In May of 1956, the Labor Board ordered that Chance be reinstated and put back to work (T. 1044).

## ARGUMENT

The petition, to say the least, is unusual in that it presents a question never properly raised in the Missouri Court system.

We recognize that this Court is not prone to decide cases on procedure if great and substantial questions on the merits are involved. However, the question presented by the petition, when analyzed, does not present a novel or substantial question, or one in conflict with applicable decisions of this Court. Instead, it simply asks the Court to take a look at a Missouri jury instruction to see if this Court agrees with the Missouri Court on a theory that petitioner never properly presented to, but which was decided by, the Missouri Court, to wit: whether the jury instruction in question submits plaintiff's contributory negligence as a bar to his recovery and therefore conflicts with 45 U.S.C., Sec. 53.

This Court has repeatedly held that certiorari may not be used by a defeated litigant merely for the purpose of securing a second appellate review of his case.

**I. Procedure: The sole question petitioner presents is not properly before this Court because it was never properly raised by petitioner at any stage of the State Court proceedings.**

Petitioner now claims Jury Instruction No. 7 improperly injected contributory negligence as a complete bar to recovery and in violation of 45 U.S.C., Sec. 53.

Petitioner did not make such objection at the time the trial court gave Instruction No. 7 (T. 1094).

Petitioner did not make such objection or preserve such point in his motion for new trial before the trial court (T. 1104-08). This in violation of Missouri Civil Rule of Procedure 79.03 requiring that allegations of error and specific objections to instructions be made in the motion for new trial to preserve error for appellate review, and which Rule reads, in part, as follows:

> "79.03 Motion for New Trial—Allegations of Error Required
>
> Allegations of error, in order to be preserved for appellate review, must be presented to the trial court in a motion for a new trial; * * * If any specific objections to instruction have not been made at the trial before submission to the jury, then such specific allegations of error in instructions must be set forth in the motion for new trial to preserve the error for review."

Nor did petitioner, in his brief to the Missouri Supreme Court, follow Missouri Rule 83.05(a) by raising such question in his "Points Relied On" (page A32, Petition). Petitioner did, parenthetically, inject the question in one sentence of a paragraph in the Argument portion of his brief (page A32, Petition).

The Missouri Supreme Court did not rest its opinion on the fact petitioner failed to present properly the present

question for review. Instead, it considered the question and rejected petitioner's contention. 289 S.W. 2d 774, 778, 779.

The procedural principles established by this Court seem clear that the litigant must follow state procedures in raising the federal question, and any failure to do so should prove fatal to his chances for Supreme Court review. *In re Lamkin* (1957), 355 U.S. 59. Also see *Hulbert* v. *Chicago* (1906), 202 U.S. 275 (complete failure to raise question at trial court level); *Edelman* v. *California* (1953), 344 U.S. 357 (failure to raise issue at trial).

Perhaps the principle is best stated by the late Mr. Justice Brennan in an article entitled *State Court Decisions and the Supreme Court*, 31 Penn. Bar Assn. Q. 393, 399-400 (1960), as follows:

> "But the fact that a federal question lurks in the case doesn't mean, standing alone, that a state decision will be reviewed. *First*, the federal question must be a substantial question. *Second*, the federal question must have been properly raised in the state courts. This is required because the state courts must first be afforded an opportunity to consider and decide the federal question. *Third*, even then we may not take the case if the state court's judgment can be sustained on an independent ground of state law."

Actually petitioner has been changing his theory of attack as he has progressed through the various courts. This becomes clear when analyzing the effort in the petition to state where the question had been raised below.

The petition obviously fails, and understandably so, to follow Rule 23 (1)(f) of this Court that one seeking review of a state court decision must "specify the stage in the proceedings in the court of first instance and in the

appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; * * *"

For the above reasons alone, certiorari should be denied.

**II. The Substantive Issue: Instruction No. 7, neither expressly nor by implication, denies petitioner any rights under the FELA.**

The petition is asking this Court to do all the work! It fails to give this Court any specifics—it simply makes sweeping charges, without reason or explanation, that:

(1) The Missouri Supreme Court failed to follow the F.E.L.A.;

(2) The Missouri Supreme Court, by approving Instruction No. 7, denied petitioner federal rights;

(3) The decision of the Missouri Supreme Court frustrates the intent of Congress; and

(4) The Missouri Supreme Court treats with a federal question not heretofore determined by this Court (pp. 5 and 6, Petition).

The above is the sum total of petitioner's argument and reasons why certiorari should be granted. Not once (in any of the four points enumerated) does he say "why" or "how". Nor does petitioner's inclusion of a portion of his brief to the Missouri court in the appendix to the petition (page A32, *et seq.*) provide any answer. In fact, the opinion of the Missouri court goes to some length treating with petitioner's complaint that Instruction No. 7 did *not* require a finding that plaintiff was contributorily negligent. 389 S.W.2d 774, 778-9. *Now petitioner complains to this Court that it did!*

If petitioner wishes to take the time to present to this court a question that Instruction No. 7 improperly in-

jects contributory negligence as a complete bar, why doesn't he tell us how this is so?

It would seem that by dangling the question before this Court, without explanation, petitioner would hope to invoke the Court's imagination in a "guessing game" as to what petitioner has in mind, and thus perhaps strike on an idea novel even to petitioner. Either this is so or petitioner has forgotten Rule 23(h) calling for an argument amplifying the reasons relied on for allowing the writ.

Although petitioner says the opinion of the Missouri Supreme Court, in approving Instruction No. 7, is wrong, he refuses to discuss it further or point out why it is wrong. Nonetheless, we are constrained to make the following argument on why Instruction No. 7 properly followed Missouri law and was not in violation of federal law.

**A. Instruction No. 7 is properly supported by the evidence, and it properly converses plaintiff's causation theory under Missouri law permitting converse instructions.**

At this point we believe it is necessarily in order to explain just what Instruction No. 7 is and how it follows Missouri procedure permitting a defendant to converse any element essential to a recovery by plaintiff.

Instruction No. 7 is in the nature of a converse instruction on "excessive speed" which was the sole basis for negligence and causation submitted to the jury by plaintiff's Instruction No. 1. In effect, Instruction No. 7 converses causation since it asks the jury to find for defendant if they do not believe plaintiff sustained damage as a direct result of "excessive speed".

The Missouri Supreme Court, in explaining permissible converse instructions, stated in *Liebow* v. *Jones Store Co.*, (1957) 303 S.W.2d 660, 662:

> "There is no set form for what is referred to as a converse instruction. The defendant can submit either the exact converse of plaintiff's verdict-directing instruction, Janssens V. Thompson, 360 Mo. 351, 228 S.W.2d 743, or the exact converse of any essential element of such instruction. Reger v. Nowotny, Mo. Sup. 226 S.W.2d 596; McCarty v. Milgram Food Stores, Inc., Mo. Sup. 252 S.W.2d 343; Oshins v. St. Louis Public Services Co., Mo. Sup. 254 S.W.2d 630. When either is done the result is what is referred to as a 'true converse instruction' and such an instruction does not require affirmative testimony in support of it. Kimbrough v. Chervitz, 353 Mo. 1154, 186 S.W.2d 461, 464. However, the defendant may also submit facts in an instruction, the existence of which would disprove, that is controvert, one or more of the essential factual elements of plaintiff's case. See Rose v. St. Louis Public Service Co., Mo. Sup. 205 S.W.2d 559. This form of an instruction also is sometimes referred to as a converse instruction. * * *".

Respondent submits that the evidence affirmatively discloses not only that Chance was standing in a three-foot space on Track 55 between the coupled hopper cars at the time the car traveling off the hump coupled into the hopper cars, but that even at a coupling speed of four miles per hour these 75 ton hopper cars would move 20 to 25 feet—more than enough to travel the three foot open space between the ends of the coupled hopper cars. Certainly this is sufficient evidence for the jury to find that plaintiff would have been "so struck and injured" even though the speed of the car was not in excess of four miles per hour. This was the main finding requested by Instruction No. 7, and no mention of contributory negligence is made.

In addition, it was plaintiff's attorney, not defendant's, who opened up the question of a Rule N violation by asking for and receiving the opinion of defendant's witness

Becker that Chance violated such rule (T. 779). However, more significantly, witness Becker explained that the only way a person could get hit down there during a coupling would be if he were standing "afoul" the track or between the couplers where the car would have to hit him (T. 799-800). This because these cars simply don't jump or swing sideways eight inches to a foot as Chance asked the jury to believe.

The evidence was abundant to support the defense that cars do not jump sideways, and, therefore, petitioner simply was in a position where he would have been *so* struck and injured whether the car coming off the hump and coupling onto the standing cars was traveling four miles per hour or over four miles per hour. Since plaintiff's Instruction No. 1 gave the jury a roving commission to find that a speed in excess of four miles per hour was negligence which in some way caused plaintiff's injuries, defendant's Instruction No. 7 simply submits a converse situation permitting the jury to find for defendant if plaintiff would have been so struck and injured at the "non-negligent" speed of four miles per hour.

Where the jury verdict is for defendant, as here, the evidence supporting an accused jury instruction is viewed, on appeal, in a light most favorable to defendant. *Samuels v. Klimowicz,* (Mo., 1964) 380 S.W.2d 418, 424.

**B. Instruction No. 7 does not raise any issue of contributory negligence.**

A reading of Instruction No. 7 discloses that the Missouri Court was right when it held that the instruction does not submit contributory negligence. Plaintiff's negligence is not even mentioned!

Instruction No. 7 does nothing more than to say that if the jury found defendant was negligent as defined in

Instruction No. 1 (coupling speed of car in excess of 4 miles per hour), then plaintiff cannot recover if the jury finds that he would have sustained the same injury if defendant had not been so negligent.

It should be emphasized here that in Instruction No. 2, petitioner, not respondent, submitted to the jury the question of his own contributory negligence and the related principles of 45 U.S.C., Sec. 53 (T. 1095-96).

The jury had to find one of two things: Either (1) that defendant was not negligent, or (2) that the negligence was immaterial because plaintiff put himself in the position where he would have sustained the same injury if defendant had not been negligent.

Certain negligence principles are axiomatic and need no supporting authority. For example, one may be negligent and not liable. Only when it is shown that the negligence was a proximate cause of the injury does the negligence become actionable. The word "causal" is not synonymous with the word "contribute". Causation is that act which produces injury and without which the injury would not have occurred. Instruction No. 7 is a correct converse instruction on the claimed causation in this case —excessive speed.

Although we are at a disadvantage because the petition makes no effort to explain the claimed error, apparently petitioner is confusing the above principles of actionable negligence and causation with principles of contributory negligence.

Instruction No. 7 permits the jury to find that the negligence (excessive speed) was not actionable if plaintiff would have been *"so struck and injured"* at a non-negligent coupling speed of 4 miles per hour. Petitioner seemingly would argue that this speaks of contributory neg-

ligence. Not so! It is conversing petitioner's sole theory of causation of the injury.

Let us assume that a train is moving at 10 miles per hour, which is a proper speed, but that if it had been moving at 50 miles per hour, such speed would have been excessive and negligent. Assume further that a person puts himself on the track in front of the train so that he is run over and gets his leg cut off and that he would have been so injured by a train going either 10 or 50 miles per hour. What difference does it make if the train is going 10 miles an hour or 50 miles an hour? The negligence is simply not the cause of the injury.

This is not a question of the defendant being negligent and plaintiff being contributorily negligent, as petitioner seems to think. It is a situation where either the jury found that defendant was not negligent (Instruction No. 1), or it found that the defendant's negligence, if any, did not cause or contribute to cause plaintiff's injuries (Instruction No. 7).

Aside from foregoing reasons, we conclude with the express language in the opinion of the Missouri Supreme Court, which opinion petitioner fails to answer or to discuss, that Instruction No. 7:

> "does not submit any acts of the plaintiff as constituting negligence and it does not authorize a finding for defendant on the basis of contributory negligence" (389 S.W. 2d 774, 779).

Perhaps we have dwelt too long and have been guilty of some repetition in our defense of Instruction No. 7. If so, it is because plaintiff's charges of error are so generalized and sweeping in nature, without giving us or the Court anything specific.

## CONCLUSION

Petitioner fails to show that the Missouri Court failed to follow Section 53 of 45 U.S.C., or any other section thereof, or that by approving Instruction No. 7, the Missouri Court denied any rights granted to petitioner by Congress, or that the Missouri Court frustrated any purpose or intent of Congress, or that there is any question of substance, federal or otherwise, in issue. The facts and the law demonstrate that the converse is true.

In essence, no substantial federal question, if one at all, has been presented. Again, the Petition should be denied.

Respectfully submitted,

GEORGE L. GORDON, JR.,
SAM D. PARKER,
JACK W. R. HEADLEY,
JOSEPH E. STEVENS, JR.,
15 West Tenth Street,
Kansas City, Missouri 64105,
*Attorneys for Respondent.*

Of Counsel:
LATHROP, RIGHTER, GORDON & PARKER,
15 West Tenth Street,
Kansas City, Missouri 64105.